Supreme Court, U.S.
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No. 971922 MAY 28 1998

In the United States Supreme Court

OCTOBER TERM, 1997

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Petitioner,

-v.-

FEDERAL RAILROAD ADMINISTRATION, DEPARTMENT OF TRANSPORTATION, UNITED STATES OF AMERICA,

Respondents,

UNITED TRANSPORTATION UNION, BROTHERHOOD OF SIGNALMEN and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Intervenors.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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29 pp

QUESTION PRESENTED

Whether the Court of Appeals erred in granting deference to a decision of the Federal Railroad Administration ("FRA") which contains no explanation of the rationale and factual basis for its determination that the Port Authority Trans-Hudson Corporation, a wholly owned subsidiary of the Port Authority of New York and New Jersey, which operates a system of passenger cars which run on track that is not part of the general railroad system of transportation, in one of the largest urban areas of the United States, operates a "railroad" within the meaning of 49 U.S.C. 20102 that is subject to FRA jurisdiction.

STATEMENT PURSUANT TO RULES 14.1(b) AND 29.6

Parties to the Proceeding:

The parties to the proceeding are Petitioner, The Port Authority Trans-Hudson Corporation, a wholly-owned subsidiary of the Port Authority of New York and New Jersey. The Respondents, the Federal Railroad Administration, The United States Department of Transportation and the United States of America. As intervenors in support of the respondents, the United Transportation Union, Brotherhood of Signalmen and Brotherhood of Locomotive Engineers.

Parent Companies:

The Port Authority Trans-Hudson Corporation ("PATH") is a wholly-owned subsidiary of the Port Authority of New York and New Jersey. The Port Authority is a bi-State agency created in 1921 by Interstate Compact which received Congressional consent. It was created to develop interstate public transportation, terminal, and other facilities of commerce within the statutorily defined Port District. 42 U.S. Stat. 174 (1921), consenting to 1921 N.J. Laws, Ch. 151 and 1921 N.Y. Laws, Ch. 154. The Compact is codified at N.Y. Unconsol. Secs. 6401-23; N.J.S.A. Secs. 32:1-1-24. Pursuant to the Compact, and subsequently enacted bi-State legislation, the Port Authority owns and operates thirty-five public facilities in the Port District. The Port Authority has two subsidiaries. Respondent, PATH, a wholly-owned subsidiary, which owns and operates the PATH, an interurban electric rapid transit system between New York and New Jersey, and the Newark Legal and Communications Center Urban Renewal Corporation, which owns and operates an office building in Newark, New Jersey.

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PETITION FOR A WRIT OF CERTIORARI

The Port Authority Trans-Hudson Corporation, a wholly owned subsidiary of the Port Authority of New York New Jersey, petitions for a writ of certiorari to review the judgment of judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App., *infra*, 5) is unreported (See Table at 132 F.3d 1482; 1997 WL 812448 (D.C. Cir. 1997)). The decision of the Federal Railroad Administration is included in the Appendix to this Petition (Pet. App., *infra*, 1).

JURISDICTION

The opinion and judgment was issued by the Court of Appeals on December 17, 1998. A timely petition for review was denied on February 27, 1998 (Pet. App., *infra*, 7). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

49 U.S.C. 20102 provides:

(1) "railroad" -

> (A) means any form of nonhighway ground transportation that runs on rails or electromagnetic guideways, including -
>
> > (i) commuter or other short-haul railroad passenger service in a metropolitan area or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and
> >
> > (ii) high speed ground transportation systems that connect metropolitan areas, without regard to whether those systems

use new technologies not associated with traditional railroads; but

(B) does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(2) "railroad carrier" means a person providing railroad transportation.

49 C.F.R. 223.3 provides:

(a) This part applies to railroads that operate rolling equipment on standard gauge track that is a part of the general railroad system of transportation.

(b) this part does not apply to -

(1) Locomotives, cabooses, and passenger cars that operate only on track inside an installation that is not part of the general railroad system of transportation;

(2) Rapid transit operations in an urban area that are not connected with the general railroad system of transportation.

(3) Locomotives, passenger cars and cabooses that are historical or antiquated equipment and are used only for excursion, educational, recreational purposes or private transportation purpose.

(4) Locomotives that are used exclusively in designated service as defined in [Sec.] 223.5(m).

STATEMENT

The "Port Authority Trans-Hudson Corp[oration] (PATH) operates a 13.8-mile-long nonhighway ground transportation system connecting New York and New Jersey" (Pet. App. 5). By letter dated November 7, 1995, PATH requested that the FRA "recognize PATH as being an inter-urban rapid transit system not subject to FRA regulations." (App. 68). Those regulations establish that "rapid transit operations that are not connected to the general railroad system of transportation" are exempt from FRA jurisdiction. 49 C.F.R. 223.3(b)(2). PATH supported its request with detailed operational information set forth in two prior letters to the FRA by which PATH sought waivers from application to PATH of certain FRA rules (App. 12, 35). Specifically, PATH noted that it operated a closed system free from interconnections with other railroads and that the major historical reason the ICC withheld from PATH, in 1961, an exemption from regulation as an "interurban electric railway" - a joint service agreement with PATH's predecessor and the Pennsylvania Railroad Company -- no longer existed (App. 14, 38). The Administrative Record before the FRA leaves undisputed the fact that PATH is "not connected with the general railroad system of transportation" ((App. 8; PATH is "physically separate from the general system [of rail transportation]"(49 Fed. Reg. 24286 (June 12, 1984)). PATH does not interchange car equipment with any other transit system or railroad, nor does PATH engage in any joint service or operating agreement with another railroad (App. 35-38)[1].

The Administrative Record also indicates that the FRA, in considering PATH's request for a jurisdictional ruling, carefully catalogued PATH's operational characteristics (App.

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1 "App." refers to the Appendix For Petitioner filed by PATH in the Court of Appeals which contains documents considered by the agency in rendering its decision. "Pet. App." refers to the Appendix to this Petition.

185) "[i]n order to obtain a full understanding of PATH's operations so that [it] could apply the available legislative history, statutory provisions, and case law to the facts . . ." (App. 185, 187-190, 194-196, 220-21). Moreover, the FRA actually prepared a report outlining those characteristics and revised such report after a staff visit to PATH's facilities in April of 1996 *(Id.;* App. 193).

However, by letter from its Chief Counsel dated December 24, 1996, the FRA denied PATH's request for a determination that PATH was not subject to FRA jurisdiction. In so ruling, while citing the fact that it had inventoried PATH's physical and operating characteristics, the FRA, in a conclusory fashion, determined that "PATH has some physical and operating characteristics similar to rail rapid transit systems . . ." but that "in light of the nature of PATH's operations, your letters and supporting materials provide no persuasive rationale for rescinding FRA's determination that PATH is a railroad carrier within the meaning of 49 U.S.C. 20102 generally" (Pet. App. 2). Finally noting that Congress had extended FRA jurisdiction to "commuter or other short-haul railroad passenger service operating in a metropolitan or suburban area . . .", the FRA concluded that "PATH is among the types of railroads Congress intended to be subject to Federal railroad safety jurisdiction." (Pet. App. 3).

PATH filed a petition seeking review of the FRA's decision in the Court of Appeals for the District of Columbia Circuit. The Court of Appeals, by decision of December 15, 1997, denied that petition finding that "the proper classification of PATH is ambiguous" and therefore, the FRA did not "abuse its discretion in determining that PATH remained a railroad carrier within the meaning of 49 U.S.C. 20102." PATH filed a timely petition for rehearing which was denied by the Court of Appeals on February 27, 1998 (Pet. App. 7)

REASONS FOR GRANTING THE WRIT

Review by this Court is warranted in this case because the Court of Appeals' reliance on familiar deference principles to affirm the FRA's decision was totally misplaced and violates a basic tenet of administrative law - in order to be entitled to deference from a reviewing court, an agency determination must articulate a satisfactory explanation for its action. While no doubt an agency is given some latitude in this area, the decision of the FRA contains no articulation of the reasons for its determination that PATH's operations were akin to those of a commuter railroad. Therefore, under long established administrative law principles honored by this Court, the FRA's decision is not entitled to such deference, nor could deference logically attach to its decision in the absence of such reasoning.

Further, the decision of the Court of Appeals upholding the FRA's determination is in conflict in principle with the decision of the Seventh Circuit which recognized that a rail system which, like PATH, operates on subway-type equipment on subway schedules is a rapid transit system which Congress deliberately excluded from FRA jurisdiction. *Chicago Transit Authority v. Flohr,* 570 F.2d 1305, 1307 (7th Cir. 1977). While since that decision, Congress has revisited the FRA's jurisdiction, in part to clarify that commuter railroads are subject to FRA jurisdiction, it has not disturbed the exclusion from FRA jurisdiction for rail rapid transit applied by the Court in *Flohr.*

1. The requirement that agency action not be arbitrary and capricious logically includes a requirement that the agency adequately explain its result. As this Court has indicated time and time again, "[i]t is an axiom of administrative law that an agency's explanation of the basis for its decision must include 'a rational connection between the facts found and the choice

made.' *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962))." *Bowen v. American Hospital Association*, 476 U.S. 610, 626 (1986). "[This Court's] recognition of Congress' need to vest administrative agencies with ample power to assist in the difficult task of governing a vast and complex industrial Nation carries with it *the correlative responsibility of the agency to explain the rationale and factual basis for its decision*, even though [the Court will] show respect for the agency's judgment in both." Id. at 627, emphasis supplied. While "[t]his does not mean that an agency's decision must be a model of analytic precision to survive a challenge.", [as indicated] * * *" an agency's explanation must minimally contain "'a rational connection between the facts found and the choice made.'" *(Dickson v. Secretary of Defense*, 68 F.3d. 1396, 1404 (D.C. Cir. 1995), citation omitted)). In this case, the FRA in issuing a decision which contains only a conclusory statement that PATH's "is among the types of railroads" that lie within its jurisdiction, failed to honor its responsibility to provide some reasoned basis for its determination.

Congress clearly placed within FRA jurisdiction "commuter or other short-haul railroad passenger service in a metropolitan or suburban area ..." 49 U.S.C. 20102(1)(A)(i). Moreover, Congress broadly defined "railroad" to include "any form of nonhighway ground transportation that runs on rails or electromagnetic guideways ..." At the same time, Congress plainly carved out from the definition of "railroad", and therefore from FRA jurisdiction, those "rapid transit operations in an urban area that are not connected to the general railroad system of transportation." 49 U.S.C. 20102(1)(B). (Pub. L. No. 97-468, Sec. 702(c), 96 Stat. 2543, 2580 (H.R. Rep. 97-571, pt. 1, at 17, reprinted at 1982 U.S. Code Cong. & Admin. News at 4499; "Section 102 would not extend

FRSA jurisdiction to rail rapid transit operations."). Faced with the decision as to whether PATH's operations were those of a "railroad" or rather, those of "rapid transit", the FRA's determination is fatally flawed because while acknowledging that PATH presents "'a somewhat unique case'" and that "PATH has some physical and operating characteristics similar to rail rapid transit systems", it simply concludes that *"[w]e believe that PATH is among the types of railroads Congress intended to be subject to Federal railroad safety jurisdiction"* (Pet. App. 3, emphasis supplied). There is no identification of those characteristics of PATH the FRA determined were akin to those of a "rapid transit system" and those which it believed were more akin to the "types of railroads" which Congress intended to be subject to its jurisdiction. In fact, the decision of the FRA contains absolutely no articulation of the appropriate standards for determining whether a ground transportation system is a "rapid transit" operation or a commuter or other short-haul railroad. Such failure to "articulate any rational connection between the facts found and the choice made" *(Burlington Truck Lines, Inc. v. United States,* 371 U.S. at 168)), we submit, standing alone, means that contrary to the court of appeals' determination, the FRA's decision fails to pass muster under long-standing guidelines for administrative action set forth by this Court and, therefore, warrants review by this Court.

The Court of Appeals rejected PATH's challenge to the Federal Railroad Administration's assertion of jurisdiction over the transit service operated by PATH. In so doing, the Court held that because PATH shares characteristics of both "'rapid transit operations' and 'commuter or other short-haul railroad passenger service', the proper classification of PATH is ambiguous, and the FRA did not abuse its discretion in determining that PATH remained a railroad carrier within the meaning of 49 U.S.C. 20102" (Pet. App. 6). We submit, however, that contrary to the Court of Appeals' decision, it is

impossible to determine from a reading of the administrative decision where the ambiguity in PATH's status lies simply because, as noted, the FRA does not discuss those characteristics.

In fact, the Record before the agency conclusively demonstrates that the classification of PATH is not ambiguous and that the operational characteristics of PATH point in only one direction -- that it is a "rapid transit" service and not a commuter "railroad." PATH's operations have no interconnection of physical facilities with any railroad; PATH does not interchange equipment or personnel with other railroads nor does PATH share with another railroad entity a unity of financial and fiscal functions (App. 11, 13, 35-38). Moreover, PATH's electrical subway-type equipment is operated on subway-type schedules.[2]

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2 FRA's inventory of PATH's physical and operating characteristics revealed the characteristics of rapid transit. In answer to the question from the FRA as to whether PATH's trackage is distinguishable from traditional railroads, the FRA determined that indeed they were (App. 185, 195). (PATH utilizes "smaller ties" ... and "block ties set in concrete"; "all switches are guarded with (with guard rails)" and "some curves are guarded") (App. 195). It also determined that "PATH MU cars differ from traditional commuter rail MU cars" in several respects (App. 195). Most significantly, the FRA confirmed its prior determination (App. 183) that the maximum authorized speed of the system cars was 55 mph (App. 190, 196; "The maximum authorized speed on Boston subways is 50mph. The maximum authorized speed on NYC subways is 55 mph"). Also PATH MU cars are 20 to 30 feet shorter in length than commuter rail cars and have wheels with a smaller circumference than commuter rail MU cars (App. 189) ("PATH MU cars are only 53 feet from collision post to collision post. Commuter rail MU cars are 75 to 85 feet in length." "PATH MU cars have 28 inch wheels, commuter rail MU cars have 32 to 36 inch wheels").

FRA's investigation also revealed that PATH was a closed system that does to participate in any joint tariffs nor does it exchange tickets with other railroads or exchange equipment (App. 190).

2. Moreover, the decision of the Court of Appeals finding that the FRA did not abuse its discretion when it determined that PATH was a "railroad", we submit, is in conflict in principle with the decision of the Seventh Circuit in *Chicago Transit Authority v. Flohr, supra,* 570 F.2d at 1305. There the Seventh Circuit held that an urban mass transit system operated by the Chicago Transit Authority, which like the system operated by PATH, consisted of electrically self-powered units that were substantially smaller and lighter than railroad cars that did not use railroad rails, did not fall within the jurisdiction of the FRA. While Congress revisited the FRA's jurisdiction after that decision, in part, to clarify that commuter "railroads" fall within the FRA's statutory authority, Congress did not alter the statutory exclusion relied on by the Seventh Circuit in that case -- *"Congress clearly never intended the word 'railroad' as used in the Railroad Safety Act of 1970 to include urban rapid transportation."* 570 F.2d at 1309 (emphasis supplied); *See,* H.R. Rep. 97-571 *(supra).* Indeed, the entire premise of the statutory scheme in issue is that there is a distinct difference between rapid transit systems and railroads, even those railroads which commuters utilize. "[I]n both the mass transit industry and in the railroad industry, the term 'railroad' as it is commonly used, does not include rapid transit systems." *(Chicago Transit Authority v Flohr,* 570 F.2d at 1307, fn. omitted).

Facing a dearth of reasoning in its administrative decision, including no reference to the operational characteristics the FRA had so carefully examined in exploring PATH's request for a jurisdictional ruling, the FRA defended its decision in the Court below by arguing that Congress defined railroad very broadly in 1988 when it revised the applicable statute to include "any form[s] of non-highway ground transportation that runs on rails or electromagnetic guideways . . ." (quoting, 49 U.S.C. 20102), and that this definition included commuter transportation passenger service as defined and clarified by

Congress in 1982 as being incorporated into FRA jurisdiction. Therefore, the FRA contended, the type of equipment utilized by a rail system did not matter.[3] Also irrelevant was the fact that PATH demonstrated that it was no longer connected to a general railroad system of transportation (Govt. Appellate Br. at 20). The key factor, according to the FRA, was the fact that PATH by its own admission, continued to provide commuter passenger service (Id. at 27-28). The government's argument proves too much. Urban rapid transit systems, including city subways, "run on rails" and many carry "commuters" as the bulk of their customers, but they are not subject to the FRA's safety jurisdiction as they are acknowledged to be rapid transit systems, not railroads.[4] As recognized by the Seventh Circuit in *Flohr,* the important point in determining whether FRA has safety jurisdiction is the fact that "the risks, hazards, technology, and operating procedures of . . . an urban transit

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3 Despite the FRA's *post hoc* argument that operational characteristics are irrelevant, as noted in the Statement, the FRA in its administrative proceedings carefully catalogued PATH's operational characteristics, in order to make its determination. However, as also noted, it engaged in no analysis of those conditions in its decision.

4 For example, the Record contains a Report by a highly respected Transportation study group, the Transportation Research Board which was issued in November 12-15, 1995 as Conference Proceedings sponsored by the Transportation Research Board and the American Public Transit Association. The Report on Light Rail Transit indicates that nationally, there are several "nonrailroads" that are engaged in interstate transportation of passengers: "Washington Metropolitan Area Transportation Authority (WMATA), connecting Maryland and Virginia with the District of Columbia, and Bi-State Metro Link, connecting East St. Louis, Illinois, with St. Louis, Missouri" as well as the Port Authority Transit Corporation operated by the Delaware River Port Authority. That same report noted that "[t]he conditions that led to the ICC's classifying the Hudson and Manhattan (PATH's predecessor) as a railroad no longer exist, yet the [Port Authority] has not applied to reclassify the transit line operated by PATH." That request, made in the same month the report was issued, is, of course, the subject of this case.

system, are far different from those involved in railroad operations, the considerations involved in formulating safety standards are also far different." 570 F.2d 1305. Although Congress has revisited the safety jurisdiction of the FRA several times since *Flohr* (Pub. L. No. 97-468, Sec. 702, 96 Stat 2580; Pub. L. No. 100-342, Sec. 7(a), 102 Stat. 624, 628), it has continued to exclude from FRA jurisdiction rapid transit systems.

In fact, PATH plainly does not fall within the statutory definition of "commuter service" which was defined by Congress in the Northeast Rail Services Act of 1981 as "short-haul rail passenger service operated in a metropolitan and suburban area, whether within or across the geographical boundaries of a State, usually characterized by reduced fare, multiple-ride, and commutation tickets, and by morning and evening peak period operations." Pub. L. No. 97-35, 95 Stat. 357, 646, codified at 45 U.S.C. 1104(4). It is undisputed that PATH does not offer reduced fare, multiple-ride or commutation tickets but rather, one flat $1.00 fare per ride for all trips taken twenty-four hours a day. Once more, however, there is absolutely no mention, much less analysis, in the FRA's decision of whether PATH operates a commuter service within the meaning of these provisions.

3. In its decision, the Court of Appeals noted that PATH "has been regulated as a railroad for decades" a factor which obviously greatly influenced the FRA (Pet. App. 5). In fact, in its final decision, the FRA also placed much emphasis on the fact that PATH had made no filing [presumably seeking an exemption] in the rulemaking proceedings in 1985 concerning FRA rules on Alcohol and Drug Use in Railroad Operations (App. 230). However, we submit that a determination of PATH's present status should not be based on some vague theory of jurisdictional estoppel or maintenance of the status quo. PATH's failure to request a jurisdictional ruling from the

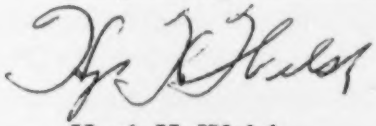
agency on its status until the present request should not be determinative of that status which is independently and objectively verifiable. That is especially the case, when, as here, it was acknowledged by the FRA that PATH has sought and been granted numerous waivers from certain safety requirements through the years at which time the FRA recognized PATH's operations as being rapid transit in nature (App. 4, 33, 49, 211-12), and when PATH has demonstrated that over time its operational characteristics had indeed changed (App. 162-63).

Since there is a real difference, as codified in the statutory framework, between urban rapid transit systems and railroads, including a commuter railroad, it was incumbent on the FRA, in its final determination, to isolate those characteristics and determine whether PATH was an urban rapid transit system or a railroad. As we have shown, it did not do so stating only, in a conclusory fashion, that "[w]e believe that PATH is among the types of railroads Congress intended to be subject to Federal railroad safety jurisdiction." (Pet. App. 3). Accordingly, this Court should grant this petition. In view of the fact that the administrative decision contains no meaningful explanation of the agency's conclusion that PATH is a railroad within the meaning of the statute, the Court may wish to consider summary reversal and remand of this case to the Court of Appeals for further remand of this matter to the FRA.

CONCLUSION

For these reasons, this petition for certiorari should be granted.

Respectfully submitted,



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